No. 03-1588

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MINKA LIGHTING, INC.,

Petitioner,

v.

CRAFTMADE INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

MICHAEL D. PEGUES
Counsel of Record
LADAWN H. CONWAY
MUNSCH HARDT KOPF & HARR, P.C.
1445 Ross Avenue, Suite 4000
Dallas, TX 75202
(214) 855-7500

Attorneys for Respondent

188730

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In a trilogy of cases decided in 1986, this Court made it clear that, faced with a motion for summary judgment, the party with the burden of proof may not rest on his allegations but must present "significant probative evidence" supporting his complaint. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). *See also Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court held that, if the evidence submitted is not "significantly probative," summary judgment may be granted. *Anderson*, 477 U.S. at 249. To date, the Court has not excluded from these standards any particular type of case.

The net effect of Petitioner's arguments is that the important "gate-keeping" function judges perform in summarily disposing of claims that have no factual basis simply does not apply in the design patent context. This cannot be the law. The decisions granting and affirming summary judgment in this area correctly recognize the responsibility courts have to monitor the outer limits within which juries may determine reasonably disputed issues of fact, and the competency of the judiciary to determine when two designs so clearly lack substantial similarity as to fall outside those limits.

The questions presented are:

1. In view of *both* the Court's standard for design patent infringement articulated in *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511 (1871) and the Court's framework for summary judgment stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), was it appropriate to affirm summary judgment

of noninfringement when the record was devoid of any competent empirical evidence that ordinary purchasers consider the patented and accused designs to be "substantially similar," as defined in *Gorham*?

2. Whether allowing trial courts to perform their responsibility of monitoring the outer limits within which juries may determine reasonably disputed issues of fact through the use of the summary judgment process comports with both *Gorham*'s standard for patent infringement and *Anderson* and *Celotex*'s standards for summary judgment?

STATEMENT PURSUANT TO RULE 29.6

Respondent Craftmade International, Inc. has no parent companies and no publicly held company owns 10% or more of Respondent's stock.

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I.

REASONS FOR DENYING THE PETITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari. The courts below concluded that the lack of substantial similarity between the patented and accused designs is so clear as to fall outside the range of reasonably disputed fact questions requiring resolution by a jury. Petitioner challenges this conclusion by posing the broad question of whether, given the standard set down by this Court in *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511 (1871), a court may ignore legitimate "ordinary purchaser" evidence and grant summary judgment of noninfringement based solely on its own comparison of the patented and accused designs.

This is not the case to decide this question. Petitioner presented no "legitimate" ordinary purchaser evidence. The survey proffered by Petitioner failed to define "substantial similarity" or otherwise incorporate the concept of consumer *deception* at the heart of the *Gorham* test and, accordingly, carried marginal, if any, probative value on the issue of "substantial similarity" between the patented and accused designs.[1] Petitioner's other evidence purporting to reflect confusion by individual purchasers was also flawed. As a result, even if believed, Petitioner's evidence had very

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1. The test for infringement under *Gorham* is:

> If, in the eye of the ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

81 U.S. (14 Wall.) at 528.

little probative value on the issue of "substantial similarity" as defined in *Gorham*. Petitioner simply failed to carry its summary judgment burden under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) of presenting "significant probative evidence" tending to support its complaint of infringement.

In any event, should the Court entertain petitioner's question, the answer is "yes"—there are circumstances in which courts may conclude, based solely on their own comparison of the patented and accused designs, that the lack of substantial similarity is so clear as to fall outside the range of reasonably disputed fact questions requiring resolution by a jury. This is so, even in the face of empirical evidence purporting to demonstrate actual confusion by consumers. Indeed, there is legitimate doubt about whether such evidence is probative on the issue of "substantial similarity" under *Gorham* because the test is objective and involves the hypothetical purchaser. Regardless, where, as here, disputed designs are simple and the lack of substantial similarity is clear, courts have an important responsibility to monitor the outer limits within which juries may determine reasonably disputed issues of fact. Petitioner's position that courts may not decide infringement issues as a matter of law undercuts this responsibility and the summary judgment process designed to end meritless litigation and avoid lengthy and costly trials. The Petition should accordingly be denied.

II.

STATEMENT OF THE CASE

A. Craftmade's Solo And Cefiro Ceiling Fans

Founded in 1985, Respondent Craftmade International, Inc. ("Craftmade" or "Respondent") designs, distributes and markets superior quality ceiling fans, light kits and related accessories. In the latter part of 1998, Craftmade received calls from its distributors around the country asking Craftmade to add more contemporary fans to its ceiling fan inventory. (A404-05[2]) In response, Craftmade retained an independent designer to design such a fan. (A404-05; A421) In making this request, Craftmade neither gave the designer any idea or sense of what the fan was to look like, nor asked him to look at any fans in connection with the new design project. (A405-06; A421)

When the designer sat down to design the fan, he believed Craftmade's contemporary fan inventory had too soft of a feel, and his goal was to create "something real contemporary, straight edge, hard line." (A407-08) He planned to achieve this harder feel by incorporating more "straight line edges" with "crisp, clean lines." (A408) Of the contemporary ceiling fans on the market at the time, the only fan that influenced the designer was the "Stealth" ceiling fan, designed by Casablanca Industries, Inc. ("Casablanca"), and that influence was limited to the fan's blade angle. (A410) While working on the project, the designer did not have in his possession any sketches, designs or photographs of Minka's Viper ceiling fan. (A417)

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2. Citations to "A__" are to non-confidential materials included in the parties' Confidential Joint Appendix filed in conjunction with Minka's appeal to the Federal Circuit.

In January 1999, Craftmade reviewed the designer's drawings, selected two for development, and ultimately produced the Solo and Cefiro ceiling fans. (A412; A420; A446; A487-88) While Minka claims innovative responsibility for the swept fan blade seen in both Minka's Viper and Craftmade's Solo and Cefiro fans, that look originated with Casablanca's introduction of the Stealth fan into the contemporary fan market in 1991—some five years prior to Minka's production of the Viper.

B. The District Court's Summary Judgment of Noninfringement

Claiming "substantial similarity" between its Viper fan and related U.S. Design Patent No. 380,539 (the "'539 Patent"), and Craftmade's Solo and Cefiro fans, Minka sued Craftmade for design patent infringement. After claim construction and limited discovery, Craftmade moved for summary judgment, asserting that an element—substantial similarity—of Minka's infringement claim lacked essential evidentiary support. (A368-96) In response, Minka submitted an expert report based on a survey of 220 participants. (A203) The survey involved a comparison of Minka's Viper fan with Craftmade's Solo and two other fans; the survey did not include Craftmade's Cefiro fan. (A201-05)

Notably, Minka's expert did not limit the survey participants to people who had recently purchased or shopped for ceiling fans—people who had merely lived in a household with someone who had bought or shopped for a fan were also included as participants. (A204) Further, the survey itself neither defined for the participants "substantial similarity" in any respect, nor asked the participants whether any "similarities" among the fans would cause them to be

deceived into purchasing one fan thinking it one of the others. (A201-05) Instead, the participants were asked only if any of the three comparison fans had "substantially the same design" as Craftmade's Solo fan. (A204)

In granting summary judgment in favor of Craftmade, the district court compared Minka's relatively simple design with Craftmade's fans, and concluded that the lack of substantial similarity was so clear as to fall outside the range of reasonable dispute. The district court did not—as Minka contends—"ignore" Minka's survey and other summary judgment evidence. Rather, the court specifically considered and discussed at length the probative value of Minka's evidence. (*Minka I*, App. C, at 22a-23a[3]) Finding the evidence of little probative value, the court emphasized the absence of a precise (or, indeed, any) definition of "substantial similarity" in the survey proffered by Minka. (*Minka I*, App. C, at 22a-23a) The court reasoned that a survey reflecting that some people, "applying their own definitions, may find the designs to be 'substantially the same' is insufficient to create a triable issue." (*Minka I*, App. C, at 23a-24a)[4]

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3. References to the opinions of the lower courts are in the format suggested by Minka in its Petition and to the Petition's Appendix.

4. The district court also expressly pointed out the defective nature—and consequential lack of probative value—of Minka's other summary judgment evidence. (*Minka I*, App. C, at 24a n.6)

C. The Federal Circuit's Unpublished, Non-Precedential Opinion Affirming the District Court's Judgment

In an unpublished, non-precedential opinion, the Court of Appeals for the Federal Circuit affirmed the district court's summary judgment. In affirming, the Federal Circuit confirmed that Minka failed to present a genuine dispute over any material facts and that no reasonable fact finder could have found infringement. (*Minka II*, App. A, at 8a)

III.

ARGUMENT

A. This Is Not The Case For Answering The Question Of Whether A Trial Court May Ignore Legitimate "Ordinary Purchaser" Evidence

Minka's Petition rests upon the premise that the lower courts ignored competent empirical evidence that ordinary purchasers consider the patented and accused designs to be substantially the same. (Petition at i, 3, 5, 7-18) This premise is incorrect. Minka's "legitimate ordinary purchaser evidence" was an expert report based on a flawed survey. Accordingly, even if the question raised by Minka is interesting, this is not the case for answering it. This case involves nothing more than Minka's failure to submit competent evidence in response to Craftmade's motion for summary judgment. The courts below considered Minka's evidence, found it lacking in probative value, and properly granted Craftmade summary judgment.

1. Minka Was Required To Submit "Significant Probative Evidence" To Avoid Summary Judgment

A court may grant summary judgment if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(e). After a party seeking summary judgment informs the district court of the basis for its motion and identifies those portions of the record that demonstrate the absence of a genuine issue of material fact, Rule 56 *mandates* the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In the face of such a motion, the party with the burden of proof may not rest on his allegations but must present "significant probative evidence" tending to support his complaint. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). While "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," there is no issue for trial unless he presents "sufficient evidence" for a jury to return a verdict for that party. *Id.* If the evidence is not "significantly probative," summary judgment may be granted. *Id.* at 249-50. Consequently, even if "some" evidence has been introduced by the party having the burden of proof, to survive summary judgment, the evidence must "be of such a character that it would warrant the jury in finding a verdict in favor of that party." *Id.* at 251. In every case, "there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to

find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Id.* (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)). In fact, a court should grant summary judgment if it would later be bound to direct a verdict in favor of the defendant. *Celotex*, 477 U.S. at 323.

2. Minka's Evidence Was Flawed And, Accordingly, Failed To Raise A Material Issue Of Fact

In this case, Craftmade moved for summary judgment on the basis that the record contained insufficient evidence of substantial similarity between the patented and accused designs. (A368-96) In response, Minka submitted a report by an expert who conducted a survey of 220 participants in an attempt to demonstrate "substantial similarity" between the commercial embodiment of Minka's patented design (the "Viper") and Craftmade's Solo fan. (A201-05)

Minka's survey was significantly flawed in a number of respects, impairing its probative value. First, the survey did not define "substantial similarity" or attempt to tailor the questions to encompass the requirements of the ordinary observer test as set down by this Court in *Gorham Co. v. White*. 81 U.S. (14 Wall.) 511, 528 (1871). Instead, the survey merely asked the participants whether the three comparison fans (which included the Minka Viper) bore "substantially the same design as the [Solo fan]." (A204) "Substantially the same design" is not the test. Under *Gorham*, the measure of infringement of a design patent is *deception* of the ordinary observer — two designs are not substantially the same for purposes of infringement *unless* "the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other." 81 U.S. at 528; *The Goodyear Tire & Rubber Co. v. The Hercules Tire & Rubber Co., Inc.*, 162 F.3d 1113, 1117 (Fed. Cir. 1998).

Minka's survey failed to ask whether any perceived sameness of design would deceive the participant into buying the Craftmade Solo believing it to be the Minka Viper. In other words, the concept of *deception* at the core of the *Gorham* test was missing entirely from the survey. Because of this significant flaw, the value of the survey as probative evidence of substantial similarity under the *Gorham* test is nominal, at best. *See, e.g., Aaron Basha Corp. v. Felix B. Vollman, Inc.*, 88 F. Supp.2d 226, 231-32 (S.D.N.Y. 2000) (survey proffered in copyright infringement context fatally defective where "substantial similarity" not properly defined for participants); *Warner Bros, Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 244-45 (2d Cir. 1983) (survey proffered in copyright infringement context provided little probative weight on issue of substantial similarity where evidence merely indicated that some people "applying some standard of their own" were reminded by one work of the other).

The survey's value as probative evidence is further suspect because it included, as "qualified" participants, people who had neither bought a ceiling fan nor looked at ceiling fans with the intent of buying one, but who merely had someone in their immediate household buy a ceiling fan within the past two years. (A204) The possibility thus exists that the survey was comprised entirely of people who had never bought or shopped for a ceiling fan. The "ordinary observer" is not just any observer, but one who, "with less than the trained facilities of an expert, is a purchaser of things of similar design or one interested in the subject." *Summers v. Laubach*, 191 U.S.P.Q. 114, 118 (D. Kan. 1974); *Gorham*, 81 U.S. (14 Wall.) at 527 ("ordinary observers" are those who "buy and use"). The "ordinary observer" is not someone who merely lives in the same

household as someone with these qualifications. Because it encompassed people who did not qualify as an "ordinary observers" under *Gorham*, Minka's survey bears little probative weight as to the reaction a qualified ordinary observer would likely have to the claimed and accused designs.[5]

Because of these flaws, Minka's expert report reflecting the results of the survey bore limited, if any, weight on the issue of substantial similarity. Certainly, this evidence was not "significantly probative," as required to avoid summary judgment. *Anderson*, 477 U.S. at 249-50. *See Tecumseh Prod. Co. v. Briggs & Stratton Corp.*, 295 F. Supp.2d 902, 914 (E.D. Wis. 2003) (according expert report little weight and granting defendant summary judgment where expert applied wrong test in reaching his opinion on substantial similarity). The mere existence of *some* evidence in support of the plaintiff's position is insufficient; "there must be evidence

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5. The survey further failed to meet minimum standards required to produce an objective, reliable survey product that may be used in litigation. For example, the survey failed to define its chosen population; the sample of respondents chosen was not representative of the general population; the data was not analyzed against statistical principles; both the survey and the expert's report failed to list, discuss, or analyze the procedures used during the interview process, no measures were used to ensure objectivity of the process, and the expert failed to follow his own quality control recommendation of a 30 to 50 percent "callback" rate in a legal survey. (A494-99) Because the survey and expert report lack reliability and trustworthiness, the district court correctly concluded that they did not raise a material issue of fact precluding summary judgment. *See Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir.) ("If the basis for an expert's opinion is clearly unreliable, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact."), *cert. denied*, 531 U.S. 812 (2000).

on which the jury could reasonably find for the plaintiff." *Spalding & Evenflo Companies Inc. v. Graco Metal Prod. Inc.*, 18 U.S.P.Q.2d 2029, 2031 (N.D. Ohio 1991) (quoting *Anderson*, 477 U.S. at 252). No such evidence exists in this case and summary judgment was appropriate.[6] The Court should deny Minka's Petition.

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6. Minka's additional "evidence" of consumer deception similarly lacks probative weight. The deposition excerpts proffered by Minka failed to establish Minka's allegation that a customer purchased several Craftmade Cefiro fans at an unidentified Lowe's home improvement store believing them to be Minka's Viper fan. (A177, A187-90, A230) Additional testimony, along with being hearsay, reflected only that certain lighting distributors thought that the Craftmade Solo and Minka Viper fans had the "same look"—not that they had been mistaken one for the other, as required under *Gorham*. (A189) Further, several of Minka's deponents were lighting distributors and other professionals in the lighting industry who fail to qualify as "ordinary observers" under the *Gorham* test. Even ignoring the flaws in this evidence, the incidents recounted are limited in number and not compelling, much less "significantly probative," such that a jury would be warranted in finding a verdict in favor of Minka on the issue of substantial similarity. *See Anderson*, 477 U.S. at 251; *Child Craft Indus., Inc. v. Simmons Juvenile Prod. Co, Inc.*, 990 F. Supp. 638, 643 (S.D. Ind. 1998) (limited incidents of alleged consumer confusion not compelling on issue of substantial similarity); *Winner Int'l Corp. v. Wolo Mfg. Corp.*, 905 F.2d 375, 376 (Fed. Cir. 1990) ("one instance of actual consumer confusion is not sufficiently probative to create a genuine dispute of fact as to infringement"), *disapproved on other grounds*, *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 92 (1993); *Puritan-Bennett Corp. v. Penox Technologies Inc.*, No. IP02-0762-C-M/S, 2004 WL 866618, *26 (S.D. Ind. March 2, 2004) (evidence a few patients called plaintiff and realized during the conversation that the product the patient was talking about was defendant's product was insufficient to raise issue of fact).

B. In Any Event, The Answer To The Question Is *Yes*—There Are Circumstances When Summary Disposition Is Appropriate, Even In The Face Of Consumer Confusion Evidence

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327. Summary judgment must be construed "with due regard" not only for the rights of persons asserting claims, but also for the rights of those opposing such claims to demonstrate, prior to trial, that the claims have no factual basis. *Id.*

Cut to its essence, Minka's argument is that, if the plaintiff proffers evidence—however weak—of consumer confusion, a district court can never summarily decide a design patent infringement case based on its own review of the patented and accused designs, regardless of a clear lack of substantial similarity of the designs. Minka's argument cannot be correct—it would undermine the purpose of summary judgment procedure and, indeed, effectively eviscerate summary judgment practice in the design patent context.

1. Courts Have An Important Responsibility, And Are Competent, To Monitor The "Outer Limits" Within Which Juries May Determine Reasonably Disputed Issues Of Fact

At least one authoritative commentator has recognized that, in cases involving relatively simple design patents, "the failure to grant a summary judgment when otherwise

appropriate would be a waste of time." 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2732.1 (3d ed. 1998). This is so because, when (as in this case) the patented design is of a simple nature, not needing further elucidation, changes in the design are usually obvious and a court is competent to affirm by mere comparison that the substantial similarity or lack thereof is so clear as to fall outside the range of reasonably disputed fact questions requiring resolution by a jury. *See Summers*, 191 U.S.P.Q. at 118 ("Where, however, the designs are of a simple nature, not needing further elucidation, and the Court can affirm by mere comparison that the designs are not the same, the question of infringement is then a matter of law to be decided by the Court and summary judgment is proper"); *Tecumseh*, 295 F. Supp.2d at 916 (granting summary judgment of noninfringement because the overall look of the two products was "too dissimilar" to support a finding of infringement); *Child Craft Indus., Inc. v. Simmons Juvenile Prod. Co, Inc.*, 990 F. Supp. 638, 644 (S.D. Ind. 1998) (summary disposition appropriate where accused design presents a "readily-distinguishable overall appearance from [the patented design]"); *Bush Indus., Inc. v. O'Sullivan Indus., Inc.*, 772 F. Supp. 1442, 1450-51 (D. Del. 1991) (observing "striking differences" in accused and claimed designs and concluding that an ordinary observer would not be confused); *Puritan-Bennett Corp. v. Penox Technologies Inc.*, No. IP02-0762-C-M/S, 2004 WL 866618, *26 (S.D. Ind. March 2, 2004) (granting summary judgment of noninfringement because the differences between the patented and accused designs were "stark"); *Keystone Retaining Wall Sys., Inc. v. Westrock, Inc.*, 997 F.2d 1444, 1451 (Fed. Cir. 1993) (summary judgment ofnoninfringement appropriate based on the "substantial differences" between the accused and claimed designs); *Moen Inc. v. Foremost*

Int'l Trading, Inc., 38 F. Supp.2d 680, 683 (N.D. Ill. 1999) (because faucet designs were not complicated, court could compare claimed and accused designs and render summary judgment in favor of plaintiff).

Indeed, as expressly recognized in the copyright context, courts have an important responsibility to monitor the "outer limits" within which juries may determine reasonably disputed issues of fact. *See Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 245 (2d Cir. 1983) (applying principle in copyright infringement context). If a case falls outside those limits, the contrary view of a properly drawn sample of the population "cannot be permitted to enlarge (or diminish) the scope of statutory protection enjoyed by a copyright proprietor." *Id.* For such cases, the use of summary judgment "is an important development permitting courts to put a swift end to meritless litigation and to avoid lengthy and costly trials." *Nelson v. Grisham*, 942 F. Supp. 649, 656 (D.D.C. 1996) (quoting *Hoehling v. Universal City Studios*, 618 F.2d 972, 977 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)). There is no reason these principles should not apply equally to cases alleging design patent infringement.[7]

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7. As in the design patent context, the competing works in a case alleging copyright infringement are analyzed for "substantial similarity" from the perspective of the "ordinary observer," although the ultimate test is different from that applied in a design patent case. *Aaron Basha Corp. v. Vollman*, 88 F. Supp.2d 226, 230-31 (S.D.N.Y. 2000) ("In the context of unlawful appropriation, competing works are analyzed for substantial similarity using the 'ordinary observer' test, which asks 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'") (quoting *Hamil America, Inc. v. GFI*, 193 F.3d 92, 100 (2d Cir. 1999).

2. Consumer Confusion Evidence Has Little Probative Value In Proving "Substantial Similarity" Under The *Gorham* Test

Further, a legitimate question exists as to the probative value of consumer confusion evidence (even a properly drawn sample of the population) in proving "substantial similarity" under the *Gorham* test. The problem with evidence of this nature is that the test is an objective one involving the hypothetical ordinary observer. *See Summers*, 191 U.S.P.Q. at 119; *Tecumseh*, 295 F. Supp.2d at 914. As a result, asking an individual purchaser whether he was deceived by the similarity between two designs "is somewhat analogous to asking a person what he might have done under a given set of circumstances in order to establish what a reasonable man would have done" in a negligence case. *Summers,* 191 U.S.P.Q. at 119. The evidence adduced would be neither objective nor hypothetical.

To further complicate matters, the "substantial similarity" test *transcends* the view of the ordinary retail purchaser at the time of purchase. *See Tecumseh*, 295 F. Supp.2d at 915; *Contessa Food Prod., Inc. v. Conagra*, 282 F.3d 1370, 1381 (Fed. Cir. 2002). That is, it is not the view of an ordinary retail purchaser at the time of purchase that is to be considered in applying the test. *Tecumseh,* 295 F. Supp.2d at 914-15; *Contessa*, 282 F.3d at 1381. Rather, the *Gorham* test "applies an objective frame of reference, the hypothetical purchasing decision to be made by an ordinary observer, to all ornamental features visible at any time during the normal use of a product." *Tecumseh,* 295 F. Supp.2d at 914 (omitting emphasis in original). Actual purchasers and survey participants, of course, may or may not consider all ornamental features visible *at any time during the normal use of the product* in making their decisions.

The truth is that "substantial similarity" is simply "not a concept familiar to the public at large." *Warner Bros*, 720 F.2d at 245. It is "a term to be used in a courtroom to strike a delicate balance between the protection to which authors [or inventors] are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement." *Id.* Accordingly, where the lack of substantial similarity is so clear as to fall outside the range of reasonably disputed fact questions, courts can and should render summary judgment to put a swift end to meritless litigation and to avoid lengthy and costly trials.

Such was the case here. The lack of substantial similarity between Minka's simple design and Craftmade's fans was so clear there could be no reasonable dispute. As result, the courts below correctly found summary judgment appropriate, and Minka's Petition should be denied.

IV.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL D. PEGUES
Counsel of Record
LADAWN H. CONWAY
MUNSCH HARDT KOPF & HARR, P.C.
1445 Ross Avenue, Suite 4000
Dallas, TX 75202
(214) 855-7500

Attorneys for Respondent